Supreme Court, U. S.
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80-271

No._____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

Malcolm Eugene Ratliff ..... *Petitioner*

v.

United States of America ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED BY REVIEW

1. The Court erred in denying petitioner's motion to dismiss the indictment upon the basis that the Government breached its promise not to prosecute petitioner.

2. The Court erred by denying petitioner's motion to strike the testimony, opinion and factual, of Reinhardt Mintken on the basis that the Government did not produce the underlying documentary evidence and secret signs and symbols upon which his testimony was based.

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Petitioner, Malcolm Eugene Ratliff, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 27, 1980.

OPINION BELOW

The opinion of the Court of Appeals in this cause has not yet appeared in the official Federal Reports, but a copy thereof is a appended hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked because of various prejudicial errors in failing to dismiss the indictment of the petitioner based on the breach by the Government of a prosecutorial promise not to prosecute, which involved the violation of petitioner's right to effective counsel and right to due process of law, and the admission of prejudicial evidence over petitioner's objections, thereby violating petitioner's constitutional rights of due process, confrontation, compulsory process, and cross-examination. The judgment sought to be reviewed was entered on June 27, 1980. No petition for rehearing was filed, but application for stay of mandate was made to that court on July 14, 1980, and stay was granted until August 22, 1980, by order of the Court of Appeals dated July 22. Title 28 USCA 1254 (1) confers upon this court the jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution Sixth Amdendment, United States Constitution.

STATEMENT OF THE CASE

On August 6, 1979, the Federal Grand Jury for the Eastern District of Arkansas returned an eight count indictment (DR 1, P. 1-6) against petitioner, Malcolm Eugene Ratliff, and co-defendant, Carl Edward Friend, charging them with violating Title 18, United States Code §1014 and §371.

On August 24, 1979, a bill of particulars was filed by petitioner Ratliff seeking to discover the essential facts with showed that the petitioner overvalued Rhine Westphalia Electric Power Corporation Bonds. (DR 4, P. 11-12) On the same date, petitioner Ratliff filed a motion to require the Government to furnish him a list of the names and addresses of all witnesses the Government intended to call at trial. (DR 2, P. 8-10) Both motions were denied. (DR 8, P. 16-17)

That which developed at trial was as follows:

A. The Indictment Transaction

In September of 1976, petitioner, a resident of Memphis, Tennessee, purchased pre-World War II German bonds in exchange for $100,000.00 face value State of Texas General Obligation bonds. (T. 194)

Later in 1976, co-defendant, Carl Friend, received some of the pre-World War II German Rhine Westphalia Electric Power Corporation Bonds from Malcolm Eugene Ratliff (T. 227) which bonds both Friend and petitioner believed to be valid. (T. 261)

Friend, a Memphis, Tennessee resident, was referred in November 1976 by a man named Fauts to Paul Farrell the owner of the First National Bank of Brinkley to secure a loan using the bonds as collateral. (T. 230) Farrell approved the loan and instructed Larry Guthrie, the bank executive vice-president, to check on the validity of the bonds by calling a broker named Wilson in Memphis, Tennessee, whose name was furnished to Guthrie by Paul Farrell. After doing so, Guthrie received information the bonds were good and he completed the paper work on the first loan on November 18, 1976, and on subsequent loans to Carl Friend on November 27, December 7, December 13, and December 27 of 1976. (Gov. Ex. 7, 8, 9 and 10) (T. 171)

The loan was made by executive vice-president Larry Guthrie based on the recommendation of owner Paul Farrell (T. 235), and, according to Mr. Guthrie, at the time of the first loan, appellant had made no representation to him about the bonds. (T. 363)

According to Carl Edward Friend, convicted felon who had been granted immunity from prosecution and against whom all charges had been dropped (T. 224, 225), Petitioner had accompanied him to Brinkley, Arkansas, on the first and second trips (T. 237) and had represented that petitioner had checked on the bonds and the bonds were worth approximately $2,500.00 a piece. (T. 236) Friend stated petitioner was to receive 25% of the loan proceeds for Carl Friend's use of the bonds (T. 271) and at such time as the loan was repaid petitioner was to get the bonds back. (T. 233) The payments were to be made by check. Government's Exhibit 16. (T. 235) Petitioner never received any money for two of the checks because they bounced. (T. 268)

According to Friend, Parrin Shappley and Jack Wilson were paid $250.00 each on instruction from petitioner. (T. 256, 257)

According to Friend on December 15, 1976, in a meeting petitioner had told Larry Guthrie that a telegram (Gov. Ex. 15) was evidence that the bonds were worth $2,500.00 a piece. Executive vice president Larry Guthrie did not remember whether Friend or petitioner had given him the telegram or if he had received it in the mail. (T. 359) Larry Guthrie had wanted the telegram in his files so that he would have as much information as possible in his files about the bonds. (T. 260)

In 1977 the loan was in default. Larry Guthrie and Paul Farrell arranged a meeting with Carl Friend and petitioner at the bank's attorney's office. (T. 242) Carl Friend told the attorney the bonds had come out of his grandfather's estate in Garland County and that he could submit proof they had been there since January 1, 1945. (T. 243) Carl Friend never produced any written proof that the bonds had come out of his grandfather's estate. (T. 244) The purpose of the meeting was not to defer action on the loans but to validate the bonds. (T. 291) No action with reference to a loan was taken by the bank as a result of that meeting. (T. 367)

The pre-World War II German bonds have never been presented for payment.

The testimony of a German National, Reinhardt Mintken, was introduced over petitioner's objection to prove the pre-World War II German bonds were worthlesss.

B. The Testimony of the German National, Reinhardt Mintken

Reinhardt Mintken is the chief of the Security Department of the Dresdner Bank in Essen, Germany (T. 481), which is the Examining Agency for the German Government for issues of bonds known as Rhine Westphalia Electric Power Corporation Bonds and Ruhr Gas Bonds. The Examining Agency was formed under the Validation Law of German Foreign Currency Act of 1952 and the London Debt Agreement of 1953 to prevent the issuers of the bonds from paying the bonds twice. (T. 405)

After the first World War, many German institutions had taken up issued bonds. Among those were the Rhine Westphalia Electric Power Corporation Bonds with four issues in the United States in the total amount of $65,000.000. Many of these issues, for a variety of reasons, had come back into German. (T. 403)

The bonds in this case are Rhine Westphalia Electric Power Corporation bonds of the 1925 issue which mature in 1950. These bonds were in the undamaged vaults of the Reichsbank after World War II in 1945 when the Russian troops opened the vaults and took the bonds. (T. 405) The Rhine Westphalia Electric Power Corporation is presently in existence and is the greatest utility corporation in Europe. (T. 434)

The Examining Agency in its beginning had made a master list of all the bad serial numbers of the bonds present in Berlin at the close of the war by having the German banks present their records of the bonds lost and the bond issuer present his records. The list of the original 10,000,00 bonds issued had been constructed in 1925. (T. 449) A second list of 4,018,000 bonds redeemed prior to 1939 (T. 450) was acquired

by the Examining Agency in 1952 from the trustee, the First National City Bank of New York.

Another list of 4,191,000 repurchased bonds was compiled by the department of the Dresdner Bank in Essen, Germany. The information to compile this last list came in response to several notices in the paper in 1952 for persons to present their losses to the Examining Agency. (T. 433) From 1953 until 1958 the bonds could be registered at the Validation Board in New York and at the Examining Agency in Germany (T. 407) The numbers of all of the bonds which were in Berlin and were lost to the Russians were then marked as were all of the bonds which were in the meantime registered. (T. 430, 431)

After 1958 1,791,00 bonds were left in circulation.

To verify a bond, Mintken checks the bond serial number against his master list and the records from all of the bonds to determine if the bonds were lost to the Russians at the end of the war. (T. 432) Additionally, to determine whether the bonds are valid, a comparison of number of the bond must be made with the records of the bonds stolen which are contained in a special vault at the bank. (T. 449) According to these records, 29 bonds each of One Thousand Dollar face value are presently outstanding and valid. (T. 408)

Practically, to cash a Rhine Westphalia Electric Power Corporation Bond, it is necessary to present the bond and an application form to the agency and to prove the bond was abroad on January 1, 1945, or, if the bond was in Germany, that the presenter of the bond was the justified legal possessor of the bonds since January 1945. The Examining Agency then checks the bond and presents the application

form with a statement to the court (T. 409) to get a declaratory decree of validation. Since 1958 a person would have to prove, in addition, that the bonds were held under hardship. (T. 411)

The master list is a looseleaf document which would not have been difficult physically for him to have copied. (T. 427)

After high school qualification Mintken had served 1½ years in an apprentice in the Dresdner Bank. (T. 481) He has been in banking since 1951 and with the Dresdner Bank since 1964. (T. 396-397) He has not studied law but is familiar with the German law of redemption of the bonds by practice and experience. (T. 408) Mintken had no personal knowledge of the notice publication in 1952, since he was not at the Dresdner Bank at that time and had nothing to do with Rhine Westphalia Electric Power Utility Corporation bonds at that time. (T. 433, 434)

Based upon Mintken's experience, training and examination, as stated, of the records and documents at the Dresdner Bank, the 120 bonds in this case, Government's Exhibit 25, were in Berlin in 1945 and are thus worthless. (T. 417)

It would be possible for someone to have had these particular bonds in their grandfather's estate and for them to be valid. (T. 465)

The petitioner was not permitted to examine the master list, nor the records upon which the testimony of the German was based; nor were they produced for either the District Court to examine or to be introduced into the record.

Neither was the German required to produce the entire secret code, some of which was marked on Exhibit 25. (T. 457) The German claimed the master list and records were state secrets that he could not reveal. (T. 452) He had not been asked to bring with him from Germany the master list or records, but he would not have brought those documents had he been asked to do so by the United States Attorney which he was not asked to do. (T. 460) Only Mintken and his secretary can see the code (T. 458) so the petitioner could not see it. (T. 453, 457) A booklet from which Mintken had been testifying was not made an exhibit even though on the face of the document it contained a statement saying there may be errors in it. (T. 452)

The Court refused to order Mintken to produce the underlying documents so that the Court could determine the existence of the privilege because there was no way to produce by subpoena the documents from Germany. The Court refused to strike the testimony of Mintken.

PETITIONER'S DEFENSE

Petitioner honestly believed the bonds were good and still does so believe, and that he has never made any material representations knowingly false to a bank.

Counsel for petitoiner and the Government stipulated that counsel for petitioner had contacted Fletcher Jackson, counsel for the Government, and informed him that the petitioner agreed to take a polygraph examination at petitioner's expense by a polygraph operator of the Government's choosing and that petitioner would agree that the results of the test, regardless of what it might be, could be introduced into evidence. Mr. Jackson agreed to check with

Mr. Dillahunty, his then superior and report back. Mr. Jackson reported back that the Government would not agree to that arrangement.

The Government and the petitioner also stipulated that Mr. Ratliff, petitioner, then took a polygraph test from Mr. George Stewart, who is a retired FBI polygraph operator who lives in Jonesboro, Arkansas, and whom the Government stipulated, is a qualified polygraph operator. They further stipulated that the test was taken and the results of the test were furnished to the United States Attorney. (T. 522) (Test results showing petitioner was truthful and an offer to prove state of the art of the polygraph were proffered by petitioner. (Ex. A on Nov. 8 and T. 401)

THE GOVERNMENT'S PROMISE NOT TO PROSECUTE (VOLUME I)

In late 1976 petitioner Ratliff received phone calls from FBI agents Masten and Hart seeking petitioner's cooperation in an investigation with reference to pre-World War II German bonds. Petitioner refused to cooperate with them unless they granted him full immunity; petitioner told them that if they would grant him full immunity, he would help the agents find the source of the bonds. (T. 59, 126, 127)

On January 4, 1977 petitioner gave agents Masten and Hart an interview and advised Masten he wished to furnish information regarding his purchase of $500,000.00 worth of German bonds. (T. 58, 60) Both at that meeting and in subsequent phone calls from Masten and Hart, the agents were advised by petitioner that if they would grant him full immunity, he would cooperate with them. (T. 126, 127)

From April to June, 1978, agent Hart from the FBI's Memphis, Tennessee office was participating in an investigation of pre-World War II German bonds at Brinkley, Arkansas, which originated from the Little Rock FBI office. (T. 61, 62)

In April of 1978, agent Hart on a separate matter had discussed with appellant a situation involving pre-World War II German bonds and a lawyer named Joe Salem in Atlanta, Georgia. (T. 63)

Moreover, at approximately this same time agent Hart was actively investigating petitioner and the German bonds in two other transactions: one involving the CNI Bank of Memphis which allegedly occurred on December 28, 1976; the other, a man named Gwaltney of Memphis which allegedly occurred on November 18, 1976. (T. 65) Hart also had numerous other meetings and phone conversations with petitioner during this time. (T. 65)

A trip to New York by petitioner on behalf of the FBI was also discussed. (T. 94)

In late May of 1978 agent Hart relayed to petitioner an offer from the United States Attorney in North Carolina which contained the conditions to which the United States Attorney would agree for an interview with Ratliff. Agent Ezelle wanted to interview petitioner because petitioner's automobile had been observed at the airport in Memphis on December 17, 1976, when a Mr. Tripoli was observed picking up 4,000 pieces of German External Loan Bonds that a New York atttorney Teplin had used at a North Carolina Bank. (T. 44) According to agent Hart the offer communicated was to not prosecute petitioner on any German bond matter in the

North Carolina District. (T. 73) Agent Ezelle of the Charlotte, North Carolina office of the FBI received a request for full immunity for petitioner from and through agent Hart. In exchange petitioner was to give agent Ezelle 250 pieces of the bonds, tell the agents where the remaining ones were and give them a truthful statement. (T. 53, 54)

According to Ratliff he had been advised in a phone conversation from Agent Hart that he had been granted full immunity with any German bonds with which he had dealt if he would cooperate with them. (T. 129)

Agent Hart denied petitioner ever made a request for immunity specifically in connection with the Brinkley, Arkansas, transaction (T. 78) and stated that Ratliff agreed to meet with agent Ezelle to see what the letter from the United States Attorney contained and then to give the agents his answer as to whether or not he would cooperate. (T. 83)

Ezelle revealed an internal FBI teletype dated June, 6, 1978, reference the negotiations between Ratliff and the FBI:

> "Until recently, Ratliff has refused to cooperate with the FBI in this matter. However, recently Ratliff requested a grant of immunity and stated that he would cooperate. Instead of a grant of immunity, Charlotte obtained a USA declination in writing re: Ratliff in the Teplin matter only. In view of this, Ratliff has advised he will, one, surrent to bureau agents approximately 250 of the $1,000.00 bonds which he obtained at instant motel; two, he will consent to an interview of this entire matter; and three, will furnish the information he has to the whereabouts of the remaining three and one-half suitcases of bonds." (Ex. 6) (T. 46, 47)

A meeting in Memphis, Tennessee, between Ezelle, Hart, and Ratliff, resulted on June 7, 1978. According to the agents, a letter declining federal prosecution of Ratliff from the United States Attorney in North Carolina was delivered to him addressed to Herbert L. Monahan from Harold Edwards, U.S. Attorney, signed by Harold J. Bender, D.C., U.S. Attorney:

> "This will confirm mv conversation on Mav 31. 1978. with special agent, Otho Allen Ezelle, Jr., in which I declined federal prosecution of Malcolm Ratliff of Memphis, Tennessee, regarding his involvement with pre-World War II German bonds in this specific investigation." (T. 43) (Ex. A, T. 42)

According to agent Ezelle, the letter referred to an investigation regarding Milton A. Teplin, an attorney in New York City involving Twenty Three Million Dollars face value in pre-World War II German External Loan bonds of 1924, (T. 24) which were brought from East Berlin during November 1976 and were given to Ezelle and another FBI agent while they were acting as bankers at a North Carolina National Bank as collateral on a Five Million Dollar loan. (T. 44)

Agent Ezelle did not know if going to New York was part of the arrangement with Ratliff. (T. 53)

According to Hart, after Ratliff read the letter of declination of prosecution, he gave a statement on the bonds, was interviewd by Ezelle and made available to Ezelle a large stack of bonds. (T. 84) According to the agents, it was made clear to petitioner he was not being given a general grant of immunity. (T. 47)

At the end of the June 7, 1978 meeting Hart and Ratliff had a private discussion in connection with agent Hart's

investigation of a New York matter involving pre-World War II German bonds (T. 83) which was also ongoing at this time. According to Hart, whatever Ratliff was getting in terms of immunity was not tied to the trip to New York. The New York trip had nothing to do with the Brinkley, Arkansas transaction or the North Carolina transaction, but rather the New York investigation was Hart's investigation out of the FBI's Memphis, Tennessee office. (T. 85)

On June 8, 1978, Ratliff accompanied agent Corbett Hart to New York. On the trip to New York he made full disclosure to Hart about the Bank of Brinkley transaction with reference to which he had previously been contacted but about which he had previously refused to talk until immunity had been obtained. Ratliff has assisted the FBI in New York on four different occasions and in Atlanta on one occasion. At those times Corbett Hart was present and was wearing a body microphone.

But for the assurance of the FBI, Ratliff would not have gone to New York. Ratliff has never been read his Miranda rights nor advised that he had a right to have an attorney. (T. 140) United States Attorney, Harold Edwards and Harold J. Bender, Assistant United States Attorney, the signatory of the letter of declination of prosecution did not testify. Herbert L. Monahan, Jr., special agent in charge, Federal Bureau of Investigation, Charlotte, North Carolina, the person to whom the letter of declination was addressed did not testify. (Vol. I)

After a hearing on petitioner Ratliff's Motion to Dismiss the Indictment because the Government breached its promise not to prosecute the petitioner, the District Court made the following findings of fact: That the New York

operation and the negotiations concerning the North Carolina investigation were independent and unrelated, and petitioner understood that this was so (T. 529) and there was a promise not to prosecute the petitioner with regard to some transactions involving some German bonds. (T. 529, 530) The District Court held that a promise not to prosecute when it is relied upon is judicially enforceable as a matterof constitutional law, and the proper remedy for a violation of that promise where there has been actual reliance, is the dismissal of any indictment which is brought in contravention of the agreement not to prosecute. (T. 533) The District Court made the further finding of fact that the promise not to prosecute which is under consideration was specifically limited to those transactions under "specific investigation" in North Carolina. That is, the so-called Teplin investigation of certain German External bonds which passed through North Carolina and which are not the subject of this prosecution. The Court concluded that the Government's promise not to prosecute had apparently been kept. (T. 533) Appendix B.

With reference to whether or not the promise was communicated to the petitioner and whether the petitioner was adequately informed of the lmits of the Government's promise, the court found that the petitioner was made aware of the precise limits on the promise not to prosecute and that he understood the rights he was giving up in agreeing to cooperate with the Government, principally his right to remain silent (T. 538), and he voluntarily gave up those rights. (T. 539) Appendix B.

The Assistant United States Attorney stated to the court that the statements given by Ratliff dealing with the matter involving the Bank of Brinkley and the German bonds were not to be used in this case. (T. 67)

At the close of the Government's case, Counts III, IV and V were dismissed by the court. After the petitioner rested his case, the jury found the petitioner Ratliff guilty of Counts I, II, VI, VII and VIII.

Post trial motions were filed in substance on the failure of the court to strike the testimony of Mintken. The District Court, the Honorable Garnett Thomas Eisele, denied these motions by memorandum order dated January 7, 1980. Appendix D.

On January 18, 1980, pursuant to said convictions, petitioner was sentenced as follows: To be committed to the custody of the Attorney General for Imprisonment for a period of thirty days on Count VIII, imposition of sentence on Counts, I, II, VI and VII was suspended and petitioner was placed on probation for a period of five years on each count to run concurrently but to be consecutive to the terms of imprisonment imposed on Count VIII on the condition that petitioner obey all local, state and federal laws and that he comply with the rules and regulations of the probation office. It was further ordered that petitioner pay a fine to the United States in the amount of $2,500.00 on each of the five counts, to be paid withing twelve months or to stand committed. Execution of the sentence of imprisonment was stayed pending the outcome of the appeal.

Jurisdiction of the District Court was based upon 18 USCA §1014 and 18 USCA §371. Jurisdiction of the court of appeals was based on 28 USCA §1291.

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT UPON THE BASIS THAT THE GOVERNMENT BREACHED ITS PROMISE NOT TO PROSECUTE PETITIONER.

1. Petitioner was denied his Sixth Amendment right to effect assistance of counsel by not being informed of his right to be represented by an attorney and having legal representation prior to waiver of his constitutional rights.

Petitioner is a businessman from Memphis, Tennessee, not a lawyer. Neither were the Miranda warnings read to him (T. 140); nor had he been advised that he had a constitutional right to be represented by counsel prior to the waiver of his constitutional rights. Respectfully, the state of negotiations for immunity from prosecution in exchange for a waiver of constitutional rights and an agreement to cooperate is a "critical" stage at which petitioner should have been informed of his right to counsel. *White v. Maryland*, 373 U.S. 59, (1963), *Hamilton v. Alabama*, 368 U.S. 52, (1961), *Dukes v. Warden, Connecticut State Prison*, 406 U.S. 250, (1972), *People v. Andino*, 80 Misc. 2d 155, 362 N.Y.S. 2d 766, 770 (1974)

> In a very real sense, an arrested defendant's decision to "cooperate" with the authorities is a critical stage in the proceedings . . . . Whatever chance a defendant may have to trade information for more lenient treatment may be irretrievably lost by premature uncounseled disclosure. The presence of counsel will ensure against a totally one-sided bargain where the defendant disgorges

> all he has in return for a vague promise of some later consideration if the information is deemed satisfactory by some absent higher authority. (*People v. Andino*, supra.)

More particularly should this be the case when petitioner is under investigation by Federal Authorities. *Massiah v. United States*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387 (1977)

In the case at bar there is a dispute between an agent for the F.B.I. and the petitioner as to the precise limits of the Government's promise not to prosecute. Either the promise was not limited and thus included the indictment transaction or the petitioner was mislead by the agents into cooperating for less than for which he bargained. The dispute would have been avoided completely had the petitioner been represented by counsel.

None of the "misunderstanding" would have occurred had petitioner been represented by counsel. Certainly any "plea bargain" or "promise" would have included the Brinkley transaction. In the absence of representation by counsel the promise not to prosecute should be deemed to include the indictment transaction, and the indictment should be dismissed.

2. The constitutional rule of *Santobello v. New York*, 404 U.S. 257 (1971), as well as those in other circuits, require reversal.

The United States Supreme Court has established that there should be constitutional "fairness" in the securing of agreements between the accused and the prosecutor which result in pleas of guilty. *Santobello v. New York*, 404 U.S. 257 (1971)

We respectfully urge the same constitutional fairness is due a defendant during negotiations for immunity by him with the government. In this case constitutional fairness at the least would require (1) representation of the defendant by counsel; and (2) there being no misleading of the defendant by the government.

In *United States V. Krasn*, 614 F.2d 1229 (9th Cir. 1980) a similar question was before the court. In that case the defendant asserted in his defense for violation of the criminal antitrust laws that an earlier plea bargain agreement between the same defendant and the government included the antitrust violation as part of the agreement and that in any event due process required that the prosecutor disclose during the plea bargain negotiations that the defendant was under investigation. The Court of Appeals agreed there was a due process violation by the government's failure to disclose.

In *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2nd Cir. 1976) after quoting extensively from *Santobello*, supra, the court stated as follows:

> . . . Additionally, fundamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance.' *Correale v. United States*, 4790 F2d 944, 947 (1st Cir. 1973)."

In *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979) the Court of Appeals found constitutional error in the district court's refusal to enforce the government's plea *proposal*. The proposal had been withdrawn prior to acceptance. The Court of Appeals stated.

> ". . . we nonetheless conclude that right and violation of right was shown, and that relief must be given. This, of course, means that we find the constitutional right to 'fairness' to be wider in scope than that defined by the law of contract."

We now note without great detail as discussed in a previous point petitioner was not represented by counsel and was not advised that he has a right to counsel.

As important we note the other circumstances in this court which clearly demonstrate that the government has not been held to "meticulous standards of both promise and performance" in this case.

At the time of the June 7, 1978 meeting there were ongoing six different investigations involving German bonds and petitioner. All of these investigations were either being conducted by or being participated in by Corbett Hart of the Memphis office of the FBI. Indeed the primary investigation was that of Hart to determine the source of the German bonds which was being conducted out of the Memphis office.

It is undisputed that Corbett Hart had known petitioner since 1974 or 1975 and from January 1977 to and through the New York investigation and during the cooperation of petitioner was continually in contact with petitioner. It is undisputed that Corbett Hart negotiated with petitioner a promise not to prosecute him for something as the trial court has found; yet at the same time Hart was actively pursuing the petitioner on a series of different investigations.

We submit petitioner cooperation including four trips to New York and one trip to Atlanta, Georgia to aid the Government to find the source and petitioner's waiver of his rights to remain silent, among other rights, was a product of the misconduct of the federal agents in not properly defining and communicating objectively to the petition the precise limits of the promise and the indictment should be dismissed. We submit this conduct certainly does not meet "meticulous standards of both promise and performance."

3. The Eighth Circuits "Objective Standard" to be applied when viewing the evidence to determine the scope of the agreement is in conflict with the Fifth Circuits "Subjective Standard" to determine the scope of the agreement.

In the Eighth Circuit the test to determine the scope of the Government's agreement is whether "the evidence viewed objectively would lead one in the position of the defendants to reasonably conclude that the (nolo) pleas would be fully dispositive of all federal criminal matters." *United States v. Minnesota Mining & Mfg. Co.*, 551 F2d 1106 (8th Cir. 1977), *United States v. Thomas*, 593 F2d 615 (5th Cir. 1979)

The Fifth Circuits standard is whether when the defendant cooperated he had a reasonable subjective expectation that he would not be prosecuted. *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979), *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978).

We respectfully submit that the evidence in the case at bar reviewed by either standard is sufficient to require reversal. But there can be *no* doubt using the

Fifth circuits standard that the scope of the agreement included the indictment transaction. This Court should resolve the conflict in the circuits.

II.

THE COURT ERRED IN DENYING PETITIONER'S MOTION TO STRIKE THE TESTIMONY, OPINION AND FACTUAL, OF REINHARDT MINTKEN ON THE BASIS THAT THE GOVERNMENT DID NOT PRODUCE THE UNDERLYING DOCUMENTARY EVIDENCE AND SECRET SIGNS AND SYMBOLS UPON WHICH HIS TESTIMONY WAS BASED.

1. The existence of the privileged nature of the documents and information in question was a question for the court and the decision of the District Court and the Eighth Circuit Court of Appeals is in direct conflict with *United States v. Nixon*, 418 U.S. 683 (1974) and other cases in other circuits.

In *United States v. Nixon*, 418 U.S. 683 (1974) the president of the United States citing Article II of the United States Constitution asserted executive privilege to certain evidence subpoenaed by the Government to use to prosecute certain defendants. This Court held that the existence of the privilege was for the courts to determine, not the President of the United States. *United States v. Nixon*, 418 U.S. 683 (1974).

In *Crosby v. Pacific S.S. Lines*, 133 F2d 470 (9th Cir. 1943), it was held that the refusal to compel officers of the British Ministry to produce correspondence for inspection to determine its admissibility was error in the absence of a

showing of a basis of the officer's claim that the correspondence was confidential, or of a showing as to how the correspondence would jeopardize the public interest, safety or security.

Respectfully, the District Court should have determined the existence of the privilege and the scope of the privilege, not private German witness.

2. Constitutionally the Government waived the privileged nature of the information by indicating the petitioner.

In *United States v. Reynolds*, 345 U.S. 1 (1953) this Court recognized the rationale behind the theory that the Government in a criminal case waives any privilege it has when it prosecutes a defendant the Andolschek doctrine.

In *United States v. Andolschek*, 142 F2d 503 (2nd Cir. 1944) it was stated thusly:

> "While we must accept is as lawful for a *department of the government to suppress documents*, even when they will help determine controversies between third persons, we *cannot* agree that this should include *their suppression in a criminal prosecution*, founded upon those very dealings to which the documents relate, and whose criminality they will, or may tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transaction in the obscurity from which a trial will draw them, or it must expose them fully." (Emphasis Added)

Roviaro v. United States, 353 U.S. 60 (1957) held that under the circumstances of that case the identity of the informer should be revealed or the case dismissed.

In *United States v. Nixon*, 418 U.S. 683 (1974), the Court stated:

> "The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicity confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantess that no person shall be deprived of liberty without due process of law. It is the manifestduty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissiable evidence be produced."

In *United States v. Coplon*, 185 F.2d 629 (2nd Cir. 1950) it was stated:

> . . . However, the refusal to allow the defense to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf.

It is not enough that the petitioner was permitted to cross-examine Mintken with reference to his testimony. Justice Burger in *Davis v. Alaska*, 415 U.S. 315 (1974) stated as follows:

> "We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green *whether* he was biased,

> counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial . . . . defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Emphasis Supplied)

We note in that case a privilege of anonymity of juvenile offenders gave way to the constitutional right of confrontation.

In the case at bar, the German witness Mintken, a private citizen of Germany, would not produce the master lists and records upon which he based his testimony. Perhaps there are no lists, secret codes and records or perhaps he has misread the lists, secret codes or records. Perhaps this is a subterfuge to protect the utility.

Petitioner's constitutional rights of confrontation, cross-examination and due process guaranteed him under the Sixth Amendment and the Fifth Amendment of the United States Constitution were violated by the introduction of the testimony of Mintken.

3. THE PETITIONER'S RIGHT TO COMPULSORY PROCESS WAS DENIED HIM.

In this case the Government has produced a witness from the country of Germany to testify to an essential element of the Government's case against the petitioner. Germany and thus the witness Mintken and the Dresdner Bank wherein all of the documents and records are kept are all beyond the boundaries of the reach of petitioner's compulsory process. A hearing was not held by the court to

determine whether a privilege does indeed exist. Yet the Government was allowed to voluntarily produce the German witness but the Government and court do not require him to produce the records and documents upon which his testimony is based. And, the witness states he would not bring them even had he been asked. Petitioner asserts that the Government by the production of only the witness without the documents has violated its good faith duty implied under the Sixth Amendment Right to Compulsory Process.

This Court, in *Washington v. Texas*, 388 U.S. 14 (1967), established that under the Sixth Admendment the defendant has a right to present witnesses to establish a defense. In *Pettijohn v. Hall*, 599 F2d 476 (1st Cir. 1979) it was stated as follows:

> In the context of a criminal trial, the sixth amendment severely restricts a trial judge's discretion to reject such relevant evidence. Exclusion of relevant exculpatory evidence infringes upon the fundamental right of an accused to present witnesses in his own defense.

The Eighth Circuit recognizes this principle. In *United States v. White*, 562 F2d 587 (8th Cir. 1977) the court held that where no statement by a Swiss citizen was admitted into evidence and the Swiss citizen was beyond subpoena powers of court, Government had no obligation to produce a witness to testify even though the defendant requested his production. In *Taylor v. State of Minnesota*, 466 F2d 1119 (8th Cir. 1972) the court stated, "The evidence in this case does not show that the serving officer did not exercise due diligence in a good faith attempt at service. Absent such a showing, no violation of the right to

compulsory process can be found." Moreover, this Court applied this reasoning to uphold the trial court's refusal to permit the defendant to introduce certain testimony without permitting the Government to have his notes and adequately cross-examining him. *United States v. Nobles*, 422 U.S. 225 (1975).

Appellant has shown lack of good faith of the Government by the failure to request the documents of the witness and by voluntary production of the German witness.

CONCLUSION

Many of the questions raised in this petition were not addressed by the Eighth Circuit Court of Appeals. The privilege issue was not discussed though the District Court's oral order Appendix C assumed the proper foundation for its analysis. Of utmost importance to the efficient administration of justice in these United States is the belief and faith of the citizenry that every individual will receive a fair and impartial trial and a due process preview thereof in accordance with the established law of the land.

This petition should be granted.

Respectfully submitted,

DALE PRICE
211 Spring Street
Little Rock, Arkansas 72201

Attorney for Petitioner

80-271

Supreme Court, U. S.
FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

Malcolm Eugene Ratliff ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

DALE PRICE
211 Spring Street
Little Rock, Arkansas 72201

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1077

United States of America,	)	
	)	
Appellee,	)	Appeal from the United
	)	States District Court
v.	)	for the Eastern District
	)	of Arkansas
Malcolm Eugene Ratliff,	)	
	)	
Appellant.	)	

Submitted: May 23, 1980
Filed: June 27, 1980

Before HEANEY, Circuit Judge, GIBSON, Senior Circuit Judge, and ROSS, Circuit Judge.

PER CURIAM.

Malcolm Eugene Ratliff was convicted pursuant to a jury trial in the United States District Court for the Eastern

District of Arkansas [1] of five counts of an eight-count indictment. [2] The jury convicted Ratliff of four counts to making false statements to a bank in violation of 18 U.S.C. §1014 (1976) [3] and of one count of consipracy to make false statements in violation of 18 U.S.C. §371 (1976). Ratliff misrepresented the collateral value and history of pre-World War II German corporate bonds in order to obtain bank loans. Ratliff contends on appeal that the indictment should have been dismissed, as the Government allegedly breached its promise not to prosecute him. Ratliff also challenges the admission into evidence of the testimony of a German banker with regard to the value of the bonds. We affirm.

In September of 1976, Ratliff, a resident of Memphis, Tennessee, Secured a quantity of pre-World War II bonds of the Rhine Westphalia Power Corporation. He testified that he purchased $500,000 face-value of the pre-World War II German bonds for $100,000 face-value Texas general obligation bonds and $20,000 in cash. In November 1976, Ratliff lent the bonds to Carl E. Friend, also a Memphis

---

[1] The Honorable G. Thomas Eisele, Chief Judge, United States District Court, Eastern District of Arkansas.

[2] Three counts were dismissed by the trial judge prior to submission to the jury.

[3] 18 U.S.C. § 1014 (1976) provides in relevant part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

resident, who used 120 of the bonds as collateral in return for five loans from the First National Bank of Brinkley, located in Arkansas. [4]

The loans were made on November 18 and 23, 1976, and December 7, 13, and 27, 1976. The Government alleged that Friend and Ratliff represented to the bank that the 120 bonds were worth $120,000. [5] In addition, on December 15, 1976, Ratliff sent a false mailgram to the bank, purportedly sent by an official of the Dresdner Bank in Essen, Germany, confirming that the bonds were worth two-and-one-half times face value, a sum approximately ten to twelve-and-one-half times the amount Ratliff said he paid for the bonds.

In 1977, the bank loans went into default. In a meeting with the bank officers concerning the default, Friend and Ratliff falsely stated that the bonds held by the bank for security for the loans had been in and obtained from Friend's grandfather's estate, when in fact both knew that Ratliff had previously obtained the bonds.

Ratliff was indicted in August 1979. Jury trial was held in November 1979. Carl Edward Friend was granted immunity from prosecution and testified for the Government. The jury found Ratliff guilty of four counts of misrepresentation and one count of conspiracy. Ratliff made post-trial motions for acquittal, arrest of judgment, and for a new trial. On January 7, 1980, the District Court denied these motions in an unpublished memorandum and order. The court

---

[4] Friend testified that Ratliff was to receive twenty-five percent of the loan proceeds in return for use of the bonds.

[5] The trial court dismissed the three misrepresentation counts against Ratliff with regard to the three December loans.

sentenced Ratliff to thirty days' imprisonment on the conspiracy count but suspended sentence on the four misrepresentation counts. The court placed Ratliff on probation for five years on each misrepresentation count, to run concurrently. Finally, the court fined Ratliff $2500 for each of the five counts.

In late 1976, Ratliff was contacted by the Federal Bureau of Investigation (FBI) concerning the source of pre-World War II German bonds that had been circulating in this country, mainly on the East Coast. Ratliff alleges that he refused to cooperate unless he was granted full immunity. In late May 1978, an FBI agent from Memphis relayed to Ratliff an offer made by the United States Attorney in North Carolina stating the conditions to which the United States Attorney would agree in order to procure an interview with Ratliff. The offer was made pursuant to a North Carolina FBI agent's request to interview Ratliff concerning his presence at the Memphis airport when German bonds were delivered. The bonds had previously been used by a New York attorney at a North Carolina bank to obtain a large loan.

The Memphis FBI agent testified that the offer communicated to Ratliff was limited to a declination to prosecute him on any German bond matter in North Carolina. On June 7, 1978, Ratliff met with the agents in Memphis. At the meeting, Ratliff was given a letter from the United States Attorney, declining prosecution, which read:

> This will confirm my conversation on May 31, 1978, with special agent, Otho Allen Ezelle, Jr., [of North Carolina] in which I declined federal prosecution of Malcolm Ratliff of Memphis, Tennessee, regarding his involvement with pre-World War II German bonds in this specific investigation.

The North Carolina agent testified that the letter referred to the North Carolina investigation involving the New York attorney. Ratliff claims that the Memphis agent promised full immunity and that the letter includes a declination to prosecute in all transactions involving pre-World War II German bonds.

The District Court credited the testimony of the FBI agents and found that "the defendant was not granted immunity from this prosecution, nor did he receive any promise or assurance that the investigation or prosecution of his case would not proceed if he cooperated with the Government." We agree with the District Court.

The factual findings of the District Court are to be upheld unless they are clearly erroneous. *United States v. Minnesota Mining and Manufacturing Co.*, 551 F2d 1106, 1109 (8th Cir. 1977). The District Court chose to credit the testimony of the FBI agents over the conflicting testimony of Ratliff. "[D]eference must be accorded the District Court's ability to observe the demeanor of the witnesses and to weigh the credibility of their testimony." *Id*. Upon a review of the record, we find that the District Court did not err in finding that the U.S. Attorney's declination to prosecute related to only the North Carolina investigation.[6]

---

[6] Ratliff also claims that even if the declination to prosecute is limited to the North Carolina investigation the conspiracy count should have been dismissed, since the conspiracy with regard to the bonds involved Arkansas, Tennessee, Georgia, New York, and North Carolina. The conspiracy Ratliff was charged with in the indictment was that he and Friend would falsely claim to the Arkansas bank that the bonds used as collateral were obtained from Friend's grandfather's estate. There is no relation between this conspiracy and the facts involving the North Carolina investigation.

Evidentiary ruling

Ratliff challenges the admission into evidence of the expert testimony of a German banker and bond examiner, Mintken, with regard to the value of the bonds. Ratliff claims Mintken's testimony was hearsay, in violation of the best evidence rule and of Ratliff's constitutional right to compulsory process. The District Court fully considered this issue in its post-trial memorandum. The question presented was whether the unavailability of a master list of redeemable bonds,[7] compiled by the German government after the war, precluded Mintken's testimony of his valuation of the bonds supplied by Ratliff. The District Court admitted Mintken's testimony, finding:

> The primary factor in this Court's decision to admit Mr. Mintken's testimony despite the absence of the master list is the unique relationship of the list, Mr. Mintken's conclusions regarding potential validity, and the value of the bonds. The issue in the case is the value of the bonds - not their value in some abstract sense, but the value they have in a normal commercial context. It is

---

[7] The bonds were issued and sold prior to the outbreak of World War II. These bonds were due and payable in 1950, but prior to World War II many of the bonds had been purchased by or on behalf of the issuer and held for conservation. During the war, the New York selling agent was precluded from cancelling the German obligations. The German authorities, however, repurchased a considerable amount of the bonds. These uncancelled bonds were stored, among others, in the Reichsbank until they would be redeemed by the issuing corporation. When Berlin was invaded at the end of the war, the Russians plundered the bank, resulting in the recirculation of the bonds. The German government set up an examining system to determine which bonds were valid and redeemable. Only a relative few of the bonds (29 with face value of $29,000) were valid and outstanding obligations as of the date of this trial. The bonds now are redeemable only in Germany. Proof of source, right to possession, and validity must be supplied by those seeking redemption. Mintken is the examiner for the issue of bonds involved in Ratliff's case.

> the Court's perception that the value is determined by Mr. Mintken's conclusions as to underlying validity, not by investigation of the master list or other background records. * * *
>
> This perception leads the Court to conclude that the relevant inquiry concerning a bond's validity ends with a thorough investigation of Mr. Mintken's conclusion and the processes behind it, which may be accomplished by his cross-examination without production of the master list. In this case, * * * the witness who testified to his conclusions was vigorously cross-examined about the background and process behind his conclusions, as well as about the reliability and accuracy of the master list and other records. His testimony regarding background was relevant to the weight and credibility assigned by the jury to his testimony regarding his conclusions, but it did not undermine the admissibility of that testimony. * * *

We agree with the District Court that Mintken's testimony was not a mere reiteration that Ratliff's bonds were not included on the master list as being valid and outstanding. To the extent that Mintken did testify to the bonds' status on the list, the testimony was admissible under the "catch-all" exception to the hearsay rule. *See* FED. R. EVID. 803 (24); *United States v. Friedman*, 593 F2d 109, 118-19 (9th Cir. 1979). Mintken was subjected to extensive cross-examination, thus satisfying Ratliff's constitutional right of cross-examination. *See United States v. Williams*, 447 F2d 1285, 1289-90 (5th Cir. 1971) (*en banc*), *cert. denied*, 405 U.S. 954 (1972).

Ratliff also contends that the District Court erred in not striking Mintken's testimony on the basis that it violated the best evidence rule. *See* FED. R. EVID. 1002. Since Mintken did not attempt to "prove the content of a writing

[the master list] " the rule does not apply herein. In addition, the District Court found the list to be "unavailable" and "not amendable to court processes in this country." [8] The best evidence rule does not apply to the list under these conditions. *See* FED. R. EVID. 1004 (2).

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[8] On appeal, Ratliff does not challenge this factual finding. He does claim that the court erred in not ruling on whether the list was privileged. Whether the master list was privileged or not is but one possible reason for its unavailability. Ratliff has not demonstrated that it is the only reason. The court, in fact, believed that it had no subpoena power over the documents in Germany. In the absence of such a demonstration, we cannot find the court's finding to be clearly erroneous. Nor did the court err in refusing to allow into evidence a booklet, written in the German language, from which Mintken refreshed his memory. The court made the document available to Ratliff and his interpreter. *See* FED. R. EVID. 612. Considerations of judicial economy and concern over confusing the jury are sufficient reasons for excluding the German notebook. *See* FED. R. EVID. 403.

APPENDIX B

PROCEEDINGS 9:30 a.m.

IN CHAMBERS

THE COURT: Are we all here? All right.

I have delayed ruling on the motion to dismiss on the basis of the alleged promise of immunity, not because I have had that much problem with the facts which are at issue but because I think it is a sensitive area and requires a careful statement of the law. So I have roughed out my decision and I am going to read it into the record at this time.

Pending before the Court is the defendant's motion to dismiss the indictment. I have reserved my ruling until now in order to thoroughly consider the issues involved. In support of his motion the defendant states that he was promised full immunity from prosecution with regard to any transactions in which he was involved prior to June 7, 1978 concerning any kind of German bonds.

The immunity was allegedly communicated to him orally by FBI agents Corbett E. Hart and Otho Ezell and was granted in exchange for information and cooperation he was to give and did give regarding FBI investigations of pre-World War II German bonds.

The defendant maintains that the promise of immunity was broad enough in scope to cover the transactions involved in this criminal prosecution, and the government should not, therefore, be allowed to proceed with this prosecution.

In response to the motion to dismiss the indictment the Government has produced the testimony of Agents Hart and Ezell that the defendant did, in fact, request full immunity in return for information regarding German bonds, but that all the agents could get for him was a declination of prosecution by the United States Attorney for the Western District of North Carolina for transactions involved in a specific investigation under way in that district relating to German External Bonds.

The agents testified that they communicated this fact to the defendant orally and by hand-delivering to him a copy of a letter written by an Assistant United States Attorney from the Western District of North Carolina. Agent Hart testified that he specifically told the defendant that he, Hart, could not do anything to help the defendant with regard to the Brinkley transactions which are the subject of this prosecution.

I think it should be pointed out that the United States Attorney for the Western District of North Carolina and Agent Ezell were seeking to obtain certain German External Bonds from Mr. Ratliff and information concerning same -- that is, evidence which was needed in the North Carolina investigation.

Mr. Ratliff claims that the immunity offer was also given to obtain his cooperation in connection with another investigation: a certian New York investigation. The Court finds that Mr. Ratliff, on the day after his conference with Messrs. Hart and Ezell did, in fact, accompany Agent Hart to New York and made certain contact with allegedly criminal bond dealers wearing a recording device placed on him by the FBI.

Agent Hart, however, testified that the New York cooperation was completely independent of and unrelated to the prosecutorial arrangements made in connection with the North Carolina investigation. Agent Hart testified that his arrangements with Mr. Ratliff concerning the New York operation were concluded some time before the negotiations concerning the North Carolina investigation.

The Court finds, as testified by Agent Hart, that the two occurrences were independent and unrelated and that Mr. Ratliff clearly understood this.

To properly resolve the issues raised by the motion to dismiss, the Court must answer four questions: was there a promise not to prosecute: if so, is the promise enforceable; what was the scope of the promise; did the Government adequately communicate the limitations and ramifications of the agreement to the defendant and did he thereby participate in the agreement voluntarily?

The Court finds that there undoubtedly was a promise not to prosecute the defendant with regard to some transactions involving some German bonds. The parties involved in this case agree and no one testifying in this case has questioned the fact that some promise not to prosecute was given to the defendant.

In *Hunter v. United States*, 405 F2d, 1176-87, 88, Ninth Circuit, 1969, the Court of Appeals for the Ninth Circuit held that in the absence of a statute authorizing enforcement officers to grant immunity from prosecution on a certain ground and in the absence of allegations that the defendant surrendered constitutional or statutory safeguards and alleged oral agreement by the enforcement officers that the

defendant would not be prosecuted is no defense to the subsequent prosecution.

The Hunter case differs from this case in at least one respect. Here there are allegations that the defendant did, in fact, surrender his constitutional right not to incriminate himself in reliance upon the promise of immunity.

More recently the Ninth Circuit law has been summarized as follows: "When the prosecution makes a deal with its authority and the defendant relies on it in good faith, the Court will not let the defendant be prejudiced as a result of that reliance." *United States v. Goodrich*, 493 F2d, 390 at page 394, Ninth Circuit, 1974.

A more aggressive approach was followed in *United States v. Rand*, 308 Fed. Supp. 1231, Northern District of Ohio, 1970, in which the Court dismissed the indictment upon finding that the Government had granted the defendant immunity from criminal prosecution in return for evidence needed and actually introduced in a civil case. There the defendant, relying upon the promised immunity, testified openly in the civil case regarding his involvement in allegedly criminal activity and the Government was attempting to prosecute him as to the matters about which he had so testified in the civil case.

The Court stated: "The evidence is clear that defendant Rand was in the circumstances, compelled to testify against himself. The Court also finds: one, that there was an immunity; two, defendants were entitled to rely on it; three, the immunity covered all 'matters introduced' at the civil trial; four, the SEC matters testified to are within the scope of 'matters introduced,' language of the immunity; and,

five, use of such evidence elicited would violate the immunity granted. In view of these findings, the conclusion is inescapable there must be an end to this litigation. To simply suppress the evidence which the Government obtained by the methods explored above would not be sufficient to remedy the violation of defendant Rand's constitutional rights. Accordingly, the indictment is dismissed."

That quote is from page 1238.

The opinion in Rand evinces an attitude which this Court shares and upon which this Court has previously spoken. In In re Kelly, 350 Fed. Supp. 1198, Eastern District of Arkansas, 1972, the Court stated: "No Court could permit the United States Attorney or the Justice Department to renege on a promise not to prosecute, even if not specifically authorized by act of Congress or his supervisors in the Justice Department without running afoul of constitutional principles."

That was at page 1200.

MR. PRICE: What was the cite again, Your Honor?

THE COURT: 350 Fed. Supp. 1198.

MR. PRICE: In re what?

THE COURT: In re Kelly.

Citing In Re Kelly, the Court of Appeals for the Second Circuit in *United States v. DeSena*, 490 F2d at 692, Second Circuit, 1973: "The Government's public promise not to prosecute was without doubt judicially enforceable."

Based on these opinions and on the reasoning which supports them, this Court holds that a promise not to prosecute, such as we are dealing with here, when it is relied upon is judicially enforceable as a matter of constitutional law. The Court further holds that the proper remedy for a violation of that promise, where there has been actual reliance, is the dismissal of any indictment which is brought in contravention of the agreement not to prosecute.

However, the Court finds that the promise not to prosecute which is under consideration here was specifically limited to those transactions under "specific investigation" in North Carolina. That is, the so-called Teplin investigation of certain German External Bonds which passed through North Carolina and which are not the subject of the present prosecution. Those transactions were completely unrelated to this case. The only undertaking by the Government was that made by the United States Attorney in North Carolina in which he declined to prosecute in connection with his investigation. That promise is not to prosecute has apparently been kept.

Although the parties have focused their attention on this issue, its resolution does not end the Court's inquiry on the motion to dismiss. A more difficult question, and the one upon which the resolution of the motion ultimately depends, is the issue of how the promise was communicated to the defendant. This, in turn, requires us to consider the nature of the evidence which the Government must tender to establish that the defendant was adequately informed of the precise limits of the Government's promise.

That attitude emerging from the opinions I have already referred to is one of concern for the protection of

individuals' constitutional rights, most often their Fifth Amendment rights. The Court must ever be mindful of its duty to safeguard these rights and must be alert to violations of rights. This Court is particularly concerned about the potential for abuse by governmental officials in situations such as the one here in which the Government offers to give up something in return for a person's agreement to give up certain of his constitutional rights.

Although the Court does not in any way disparage the motives of officials charged with the enforcement of the laws of the United States, it is aware that the zeal of such officials may sometimes lead them to push the powers that come with their positions of authority to or even beyond the limits of constitutionality. The Court has the responsibility to delineate these limits and to police them.

The Court of Appeals for the Fifth Circuit has held that plea bargaining agreements and agreements not to prosecute are to be judged by an objective standard somewhat analogous to the standards by which contracts are assessed. *Johnson v. Beto*, 466 F2d, 478 at 480, Fifth Circuit, 1972; *United States v. Calimano*, 576 F2d, 637 at 640, Fifth Circuit, 1978.

While this Court agrees that such agreement must be "of more substantiality than mere expectation and hope," 466 F2d at 480, the contract analogy must not be carried too far. In a contract situation the parties deal at arm's length and usually with much more freedom of choice. Ordinarily the party attempting to rely upon a contract in a civil case has the burden of proving that a contract exists and that its terms sustain that party's position. But in a criminal case like this one, it is the opinion of the Court that once a prima facie

showing has been made that some agreement not to prosecute has been struck, the Government must then successfully bear the burden of establishing that the agreement is not violated by pursuing the particular prosecution at hand. Otherwise, the indictment must be dismissed.

This standard is necessitated by the fundamental character of the rights involved and by the bargaining advantages which the government officials often have by virtue of their assumed greater knowledge of the law, their perceived credibility, and their broad prosecutorial discretion. When an individual gives up fundamental constitutional rights in return for a prosecutor's promise, the Court must satisfy itself that such rights have been given up voluntarily.

Santobello v. New York, 404 U.S. 257, 266, 1971 concurring opinion by Mr. Justice Douglas. The Court must be particularly alert to the issue of voluntariness where, as here, the individual giving up constitutional rights is, at the time he gives them up, not a de jure defendant, but only a de facto defendant or not a defendant at all. Such an individual is less likely to have consulted an attorney than one who has already been charged with a crime. See *United States v. Mandujano*, 425 U.S. 564 at 596, 1976, concurring opinion of Mr. Justice Brennan, citing In re Kelly, supra.

The issue of voluntariness is related to the accuracy of the individual's knowledge of what he is giving up and of what he is getting in return. These concerns, voluntariness and its predicate, accurate knowledge and information, brings us to the issue: to what extent, if any, is the Government required to inform the individual of the rights he is giving up and of exactly what he is getting in exchange? Should the individual's rights be read to him in the manner of Miranda

warnings? Should the Government be required to produce a statement signed by the individual delineating precisely the concessions made by the Government in order to prove the scope of the declination to prosecute and the communication of that scope to the individual?

Several courts have examined alleged promises not to prosecute in cases in which such written evidence was not produced and have found that the promises did not exist. See, for example, *United States v. Greene*, 578 F2d., 648 at 657, Fifth Circuit, 1978, cert denied, 439 U.S. 1133, 1979; *United States v. Calimano, supra; United States v. Weiss*, 599 F2d., 730 at 735, Fifth Circuit, 1979.

At least two opinions have held that although a promise not to prosecute was made, the scope of the promise was not broad enough to cover the particular prosecutions then before the Court. *U.S. v. Pellon*, No. 78 Cr. 0164, slip opinion, Southern District of New York, August 23, 1979. *United States v. Alessi*, 544 F2d., 1139, Second Circuit, 1976, cert. denied, 429 U.S. 960, 1976.

It is the opinion of this Court that when an agreement not to prosecute is found to exist, the Government may, in some cases, prove the limits on the scope of the agreement, the defendant's knowledge of those limits, and his voluntary participation in the agreement without producing a writing signed by the defendant; nor must the Government prove in every case that Miranda-type advice was given. Nevertheless, the Government has the burden of clearly establishing the precise agreement. Ambiguities, if any, should ordinarily be resolved against the Government since it is usually in control of the bargaining situation.

Of course, the clearest evidence in this regard would be an unambiguous written statement signed by the defendant which identifies the rights he gives up and the precise limits of any promises he receives in return. But this preferred type of evidence will not always be needed in order for the Government to prevail.

Turning again to the facts of this case which are relevant to this issue, the Court credits the testimony of Mr. Ezell and Mr. Hart. The Court finds that the defendant was not granted immunity from this prosecution, nor did he receive any promise or assurance that the investigation or prosecution of this case would not proceed if he cooperated with the Government. Indeed, Mr. Hart specifically advised the defendant that the Brinkley Bank investigation was not under his control and that all the FBI could do in that connection would be to advise the authorities of the defendant's cooperation in the other cases.

The Government's limited promises to the defendant are clearly reflected in Government's Exhibit A and B. As I recall, Government's B was a memorandum executed on the day before the meeting -- I think June 6th. I don't have it before me -- but it carefully spells out the limits upon the declination to prosecute and was made essentially contemporaneously with the events.

And as I have already said, I also credit the testimony of Mr. Hart and Mr. Ezell in connection with their negotiations with the defendant. The Court finds that the defendant was made aware of the precise limits on the promise not to prosecute. The Court further finds that the defendant understood the rights that he was giving up in agreeing to cooperate with the Government, principally his right to remain silent.

The defendant had exercised that right up until the time of his cooperation and had made it clear that he would continue to exercise that right until he found it advantageous to relinquish it in exchange for a prosecutor's promise. This same background supports the finding of the voluntariness of the defendant's participation in the agreement.

Knowing what each side was giving up and knowing that he could continue to exercise his right to remain silent if he chose to do so, the defendant voluntarily decided to exchange that right in return for the North Carolina declination of prosecution.

Upon the facts and circumstances here, then, there is no basis for dismissing the indictment and an order will be entered overruling the defendant's motion to dismiss the indictment on the basis of the promise of immunity.

APPENDIX C

IN CHAMBERS

THE COURT: All right, gentlemen. We are in chambers. Both parties have rested, and there are some matters we must dispose of.

We have the motion to strike the testimony as to value by the witness Mr. Mintken. Frankly, that motion has caused me considerable difficulty. The motion directly raises some very important constitutional problems with respect to due process and with respect to confrontation. It indirectly raises some evidentiary problems concerning best evidence, but I am not concerned with that.

I think the analysis should start with a recognition by the Court that it has no power or authority to require the production of the records of this German agency. And I gather that those records are not only unavailable to us but are privileged and protected in Germany by German law, although perhaps there might be some in-camera way in which this Court at Dusseldorf could inquire into those agency records.

Now although I deem it essentially irrelevant to the issue, I saw nothing in Mr. Mintken's testimony which would suggest in any way that he was lying or prevaricating about his records or the accuracy of them. As I say, that's probably irrelevant to the issue of the appropriate scope and function of cross examination in a criminal case.

I have already observed that we have an analysis here that might be equated to a hearsay analysis. It is possible to

look at Mr. Mintken's testimony as to value in that light and to state that he is the Director of the validation agency, the Examining Agency which has the responsibility of validating these bonds and he had that position and held that position in 1976.

I think it is safe to say that any inquiry of his office by anyone who wanted to find out the value of the bonds or the procedures to be followed would essentially have elicited the same testimony he gave here in court before the jury. The laws concerning this matter are public record and, therefore, are available to the public to examine. So the value of any bonds over which this agency has validation responsibilities directly turns on what that agency represents to anyone who wants to cash in on those bonds in terms of the value of the bonds and in terms of the procedures and requirements necessary for validation.

We know that the defendant acquired bonds back in '76 at 20 cents on the face or 25 cents on the face in different transactions when, in fact, there are representations here that these bonds are worth not five times or four times that price, but 12 times that price when interest is included. If these were like any other bonds that are dealt with in the bond market, that depreciated value would reflect problems of the company in making payment or it would reflect such disparate other market opportunities as to require the depreciation of these values to command a comparable return.

That would be the assumption that this is a bond in the usual market situation. No one was under any illusions that these pre-World War II bonds were in a typical bond market. Essentially the market was clandestine and the values can be

seen by the transactions testified to or admitted by the defendant in his own statements.

Those values clearly had to reflect what was going on in Mr. Mintken's agency because that is the focal point of the value of all of these bonds. What happens there is the final -- that is as near the final state of valuation. It is true that his agency examines the applications and makes a recommendation and then passes it to the court at Dusseldorf which makes the ultimate determination; but they all pass through the Examining Agency in the first instance.

Therefore, what these bonds might be trading for around the world on this kind of a market would reflect the problems and difficulties that might exist in collecting, so whether Mr. Mintken might have been in error, say, as to certain of his records -- by the way, we have to think of this in terms of the levels of records that we are talking about. They had obtained records from a great variety of sources, as I understand it, from the Reichsbank in which many of these bonds had been redeemed and destroyed before 1939. And then from various sources with respect to the repurchase of another 4.1 million between '39 and '45 which were not destroyed because the trustee was not available to consent to that sort of an arrangement.

They obviously had records from the Rhine-Westphalia Company, they had records from other banks, they had records from the City Bank of New York, the trustee. They, I gather, had records from police authorities in various countries, and I think if one were to have been able to pursue the issue with the witness at his office, he would have found that the records that he has were permutations, combinations, extractions from other records that are long gone,

destroyed, and no longer available. That probably would be where that road would lead, but once again, that potential factual circumstance cannot be used as a criteria for determining the appropriate scope of cross examination.

So getting back, then, the only pertinent issue is value. And I am suggesting that an analysis might be made which would say that the value was more a reflection of the actual representations made by the agency to people seeking to cash the bonds than it was to the truth or accuracy or lack of accuracy of any of the data they may have had internally and upon which they might have been relying.

If that is so, the cross examination which might reveal such inaccuracies and inadequacies would not change the pricing function, the value fixing function of the representations that were actually being made, and to now discover in 1979 that the representations that he was making or saying or talking about these bonds in 1976 were inaccurate would not in any way change the market value in 1976, the pertinent period of time.

Having said all that, I end up being highly skeptical that with that analysis -- and I am always sensitive to any diminution of the right of cross examination as a vehicle for establishing the truth. Then I recognize that if I were to strike the testimony of Mr. Mintken as to value, that would be the end of the matter. The Government wouldn't appeal. Well, under certain possible circumstances it could.

It is an issue that is of importance and probably should be analyzed by someone who has more time to research it. If I were absolutely convinced that it should be stricken, I'd do so, even despite my curiosity as to what the Court of Appeals

might do with more time and opportunity to analyze it; but I'm rather of the opinion that the limited research we have done and the results of further research that I would expect and this is just a guess, more or less a hunch, would support permitting Mr. Mintken's testmony under these unique and peculiar circumstances to stand.

So I am going to let it stay in, recognizing that I deem it to be a serious and important issue and one as to which I have considerable doubt.

MR. PRICE: Your Honor, when you finish that may I address the issue briefly?

THE COURT: You may right now.

MR. PRICE: May it please the Court, I would like to call back to your attention what transpired in the courtroom. First, I will lay the setting. The only witness that testified as to value of these bonds that they were of no value was Mr. Mintken. Mr. Mintken had records with him, records from which he testified with reference to bonds which had been redeemed, bonds which had been repurchased, bonds which were still outstanding.

I asked for that document to be put into evidence in the record and made an exhibit to his testimony. The Court refused me that request.

THE COURT: I must interrupt you and state at no time did I understand it had that information. I said unless you could show me some good reason why that particular document should be put into evidence, I wasn't going to permit it in.

MR. PRICE: That particular document contained the language that makes the whole thing so important. That document contained language which my interpreters brought out and finally elicited from the witness that said it contained errors.

THE COURT: As I understand the appropriate German interpreter, there are possible errors and like the typical caveat that a CPA puts on a report. That's in the record. That language is there before the Court of Appeals.

MR. PRICE: Nevertheless, the Courts of Appeals will never have the ability to view the document which I have tried to get into evidence, which was here in this courtroom, which the Court had the ability to help me make a record to go up with.

THE COURT: I didn't look at it. I told you unless you stated some reasons -- you had it and you looked at it -- for it to be included that I wasn't going to do it.

MR. PRICE: The reasons I asked for that is because of the language, even though we might disagree as to what it actually was that the interpretation was, because it sets forth the facts I have just outlined here with reference to the bonds that were redeemed prior to 1939. The bonds that had been repurchased or redeemed between 1939 and 1945 and the bonds that were outstanding in 1945, which my recollection was was 191,000 -- that's not right.

THE COURT: One million --

MR. PRICE: 1,191,00.

THE COURT: Was it anything different than what he testified to?

MR. JACKSON: He testified to everything on the page.

MR. PRICE: I take issue with that.

THE COURT: You had a chance to cross examine in connection with those facts.

MR. PRICE: What can a defendant do with a witness he is trying to cross examine with a document that the man has been reading from and talking from other than to say, Your Honor, we ask this be made an exhibit to this record, and we did that.

THE COURT: Well, you also did not point out anything in it that would justify the Court -- that was after a recess when you had an opportunity to go over it with your interpreters.

MR. PRICE: Again, I wouldn't challenge the Court's recollection of it because I know it's better than my own, but this occurred right in the middle of the man's testimony. The reason for the recess subsequently was for us to discuss the signs and symbols and secret writings that he had that he wouldn't reveal.

THE COURT: Are you saying you know what's in the record or you don't know what's in it? Did you find out, or did not you find out?

MR. PRICE: As far and I'm concerned, I don't know what all is in the thing.

Now let me move forward. Because this is the only man who testifies with reference to value, for us to be limited in cross examination of that witness before this jury absolutely hamstrings a defendant in there trying to defend himself. This man --

THE COURT: What did you hope to show? That they were valuable?

MR. PRICE: The man was mistaken with reference to either his serial numbers are concerned or his secret code does not actually show the recollection of what he came up with because we know there are some bonds -- at least some bonds that he admits are still outstanding.

THE COURT: Twenty-nine, he says, of which these --

MR. PRICE: You know, even by cross examination we don't have to accept that figure of $29,000. We had a right to go in and say they literally have $1,191,000 and just because he said it doesn't mean that it's gospel. That's the whole point of cross examination: to discredit that witness.

THE COURT: Well, I understand that.

MR. PRICE: Again, we do not have to accept the accuracy of either his testimony or his records, and without the ability to discredit him by his own records in front of the jury, the defendant is in pititful shape.

THE COURT: Well, you have a record on it, and I am doubtful about my ruling, but I believe it's correct.

One comment is, yes, I believe he is the only one who made direct testimony as to value. In other words, that they were valueless; but there is evidence independent of his testimony as to value. We have discussed that at various times during these recesses on the record.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

United States Of America.....*Plaintiff*

v. No. H-CR-79-9

Malcom Eugene Ratliff.....*Defendant*

MEMORANDUM AND ORDER

Pending before the Court are the defendant's post-trial Motions for Arrest of Judgment, for New Trial, and for Judgment of Acquittal. All of the motions rest on the same ground and will be resolved by the same analysis. For the reasons heretofore stated of record during the trial and for the reasons which follow, the motions will be denied.

BACKGROUND

On November 15, 1979, after a four-day trial, the defendant, Malcom Eugene Ratliff, was convicted by a jury on Counts I, II, VI, VII, and VIII of an eight-count indictment. Counts III, IV, and V were earlier dismissed by the Court. Counts I and II charged the defendant with having materially overvalued certain bonds, in violation of 18 U.S.C. § 1014. Count VI charged the defendant with having a materially false statement in a fraudulent mailgram, in violation of 18 U.S.C. § 1014. Count VII charged the defendant with having made a materially false statement concerning the history of certain bonds, in violation of 18 U.S.C. §

1014. Count VIII charged the defendant with conspiring to make the materially false statement identified in Count VII, in violation of 18 U.S.C. § 371.

An essential element of the crimes charged in Counts I and II is a material overvaluing of the bonds. To determine whether a bond has been overvalued, one must have some knowledge of the true value of the bond.[1] During the trial, the government called as a witness a bank official from Germany who testified that the bonds were invalid and therefore worthless. At trial, the defendant challenged the admissibility of the German witness' testimony on the value of the bonds. The testimony was admitted over his objections. His renewed challenge to the admissibility of the testimony is the sole basis for the pending motions.

The defendant seeks to have the verdict of guilty on each count set aside. At the outset, the Court notes that the testimony at issue bears only on the true value of the bonds, which is not relevant to the charges in Counts VI, VII, and VIII. For this reason, the verdicts on those counts would not be affected, regardless of the admissibility of the questioned testimony.

The challenged testimony is obviously relevant to the issues raised in Counts I and II. It constituted proof on the true value of the bonds and is, therefore, directly relevant to the charge of materially overvaluing those bonds. The only other evidence which might support a finding that the bonds were worth substantially less than the defendant

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[1] There was ample evidence that the defendant *believed* he was falsely overvaluing the bonds. However, if, contrary to his belief, the bonds were in truth as valuable as represented, there would have been no misrepresentation. So evidence of actual value is required.

represented them to be worth was the defendant's own statement contained in Government's Exhibit 17, indicating the low price he was paying for the bonds,[2] which could, of course, bear directly upon their market value.[3] Still, the jury could have, and probably did, rely upon the testimony at issue in finding the defendant guilty on Counts I and II. Therefore, if the testimony was erroneously admitted, those two verdicts should not stand.

In essence, the defendant asserts that the German witness testified on the basis of, and with reference to, records which he refused to produce for inspection or any other purpose. The defendant maintains that the witness should have been compelled to produce the records or, in the alternative, that his testimony should have been excluded altogether. The Court considers this to be a close and difficult issue.

TESTIMONY

The German witness, Mr. Reinhardt Mintken, testified to the general history surrounding the bonds involved, which is not substantially in dispute. The bonds are all Rhine-Westphalia Electric Power Corporation (Rhine-

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[2] The defendant's statement indicates that he bought $500,000 face value of Rhine-Westphalia Electric Power Corporation bonds. For $400,000 face value of the bonds, he traded $100,000 face value of State of Texas fractional coupon bonds. For $100,000 of the bonds, he paid $20,000 cash. The testimony at trial indicates that the defendant represented these bonds to be worth 2-½ times their *face* value or approximately 10 to 12-½ times the price he paid for them.

[3] Had the Court excluded Mr. Mintken's testimony the jury could have based its finding of actual value on such evidence. But the Court admitted Mr. Mintken's testimony, over defendant's objection, so it is impossible to conclude that the jury did not rely on his testimony.

Westphalia) bonds issued in 1925 with a maturity date of 1950. Rhine-Westphalia, a large German utility company, issued $10,000,000 face value of the bonds - ten thousand bonds with a face value of $1,000 each. The bonds were printed in the English language for sale in America. The trustee and redemption agent was National City Bank of New York, which was the sole agent with authority to cancel the bonds when they were redeemed.

By 1939, 4,018 of the bonds had been redeemed and canceled by National City Bank of New York. Between 1939 and 1945 inclusive, the bonds could not be redeemed and canceled because World War II precluded commerce between Germany and the United States, and National City Bank of New York, as an American citizen, could not cancel the German obligations. However, during that period, 4,191 of the bonds were repurchased by the German authorities, and the repurchased but uncanceled bonds were stored in German vaults. These bonds or a large number of them were allegedly taken from the vaults by the Russians when they gained possession of the vaults during the War. Subsequently, many of them were reintroduced into commerce without the authority of the issuer. According to Mr. Mintken, the London Debt Agreement of 1953 invalidated all the bonds which had not been redeemed prior to 1953. Nevertheless, the bonds are bearer bonds which appear to be worth their face value if uncanceled. Pursuant to the German Validation Law of 1952, a bearer may still redeem the bonds if he can prove, essentially, that they were not among those which had been repurchased and then reintroduced into commerce by the Russians.

Since 1945, most of the validatable, outstanding bonds have been redeemed and canceled. According to Mr.

Mintken's testimony, only twenty-nine potentially valid, uncanceled bonds are still outstanding. This figure is derived from a master list which indicates the status of each bond issued in the 1925 Rhine-Westphalia issue - redeemed and canceled, repurchased and invalid but missing, or outstanding and potentially valid. The master list was compiled after World War II from the records of banks, police authorities, and other entities which had dealt with the bonds. Mr. Mintken testified that under current German law the master list and its contents are not available to the public but are only available to very few individuals, of whom he and his secretary are two. It is this list which the defendant sought to obtain at trial.

Counts I and II charged the defendant with materially overvaluing 50 Rhine-Westphalia bonds which were pledged as collateral for loans at the First National Bank of Brinkley, Arkansas. Dismissed Counts III, IV, and V made similar charges involving 70 bonds obtained through the defendant. On the basis of information derived from the master list and recorded by Mr. Mintken in coded notes, Mr. Mintken testified that the serial numbers on the bonds involved revealed that all 120 of the bonds were among those which had been repurchased during the War and then recirculated via the Russians. He acknowledged that the bonds could also have been counterfeited. He stated that in either case the bonds were invalid and not potentially validatable.

The defendant sought to have the master list produced or in the alternative to have Mr. Mintken's testimony excluded at trial. The peculiar circumstances of this case cause the Court to conclude, as it did at trial, that the testimony was admissible even without production of the master list. The defendant is apparently not seeking the underlying

documentation from which the master list was constructed. Nor has it been determined what, if any, such documentation might in fact presently exist and be possessed by Mr. Mintken or anyone else.

THE WITNESS

Mr. Mintken has been Director of the Securities Department of the Dresdner Bank in Essen, Germany, since 1964. He also serves as a quasi-government agent, the Examining Agent, with regard to the Rhine-Westphalia bonds. In this latter capacity, he is the sole person responsible for making the intial determination of the validatability of Rhine-Westphalia bonds which are presented for redemption. The only way to determine whether a Rhine-Westphalia bond is potentially valid is to present it with an application to Mr. Mintken for redemption. Mr. Mintken then determines whether or not the bond is potentially valid. If it is, he sends it on to a quasi-judicial agency, the Chamber of Validation, which validates the bond and authorizes payment for it. If the bond is not validatable, he returns it to the bearer with an explanation that the bond is invalid. Although a disappointed bearer may present a rejected bond to the Chamber of Validation in an attempt to convince that agency that the bond is potentially valid and that it should be paid, and although the Chamber of Validation must authorize payment for the bonds which are approved for redemption by Mr. Mintken, the Court finds that it is really Mr. Mintken's decision which actually determines the potential validity and the value of the bond for all practical purposes. The "market value" for a particular bond would be directly responsive to Mr. Mintken's assessment of its potential validity regardless of the accuracy of the information upon which Mr. Mintken based his judgment.

ANALYSIS

In support of his motions, the defendant raises the Due Process Clause of the Fifth Amendment to the United States Constitution, the Confrontation Clause of the Sixth Amendment, the right of cross-examination, the Compulsory Process Clause of the Sixth Amendment, and the best evidence rule. The only denial of due process alleged by the defendant is the asserted denial of his right of cross-examination. As asserted in his motions, the defendant's right of compulsory process comes into play in this case only if necessary to effectuate his right of cross-examination. The right of cross-examination has been recognized by the United States Court to be implicit in the Sixth Amendment right of confrontation. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Therefore, all the constitutional grounds raised in support of the defendant's motions rest on an analysis of the right of cross-examination as it applies in this case.

Ordinarily, in a criminal case when the government attempts to prove the contents of a printed record by a witness' oral testimony, the best evidence rule entitles the defendant to production and introduction of the record itself. *United States v. Rohalla*, 369 F.2d 220, 223-24 (7th Cir. 1966). However, the Court finds that the master list and the background records, if any, sought by the defendant in this case are unavailable to the Court and to the parties and are not amenable to court processes in this country. At least one court has held that a non-disclosure law of a foreign country should not preclude a United States District Court from ordering production of documents discoverable under United States law and in the possession of a United States corporation in the foreign country. *Arthur Andersen &*

Company v. Finesilver, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). However, in this case the records sought are not in the possession of a United States citizen and are not regualted by United States law. Most signigicantly, they are not subject to the control of the United States government. Rather, they are the creation of the German government, in the possession of the German government, and under the control of German law. The Court finds that an order of this Court compelling production of the records sought would not result in their production, regardless of sanctions imposed. Under these circumstances, it would be futile for the Court to require the government to produce and introduce the purported best evidence. The inquiry then becomes whether, in the inevitable absence of the records sought, the Court may constitutionally admit oral testimony on the validity of the bonds involved which is based on the information contained in the records.

The Court has found no cases directly on point, though some cases suggest parameters to be considered in resolving this issue. In *Jencks v. United States*, 353 U.S. 657, 672 (1957), the Supreme Court stated:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. *Accord, Roviaro v. United States*, 353 U.S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other

> confidential information in the Government's possession."

Jencks differs markedly from this case. The records sought are not statements or reports of the witness. The government is not in possession of the records and is not responsible for making them secret. In fact, the United States government has no control over the records. Their secrecy is imposed by the German government because of the fear that release of the serial numbers of the valid bonds would invite production of counterfeit bonds with those numbers. Nevertheless, *Jencks* stands for the broad proposition that in some cases in which the defendant's right of cross-examination is impeded by the government's non-disclosure of records on security grounds, testimony regarding the content of the records may not be admitted.

In *Galloway v. Brewer*, 525 F.2d 369 (8th Cir. 1975), *cert. denied*, 424 U.S. 974 (1976), the court relied on *Chambers v. Mississippi*, 410, U.S. 284, in holding that a state court committed constitutional error when it refused to order production of all materials and records of a polygraph examiner who testified as to the truthfulness of the defendant's answers to certain questions. The parties had stipulated that the examiner would administer a polygraph test and that his opinion might be offered in evidence. The court held that the denial of access to the materials sought by the defendant would deny him his constitutional right of confrontation by impeding his ability to cross-examine the polygraph examiner. *Galloway v. Brewer*, 525 F.2d at 370.

The Court's finding that the records sought in this case are unavailable makes more analogous *United States v.*

Sewar, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In that case, the defendant had been prosecuted for manslaughter and felony drunk driving. The trial court had suppressed testimony on the alcohol content of the defendant's blood by the technician who had tested a blood sample because the sample had been inadvertently destroyed and was unavailable to the defendant for independent testing. Relying on *United States v. Augenblick*, 393 U.S. 348 (1969), the Court of Appeals reversed, holding that the defendant's rights of cross-examination and of confrontation would not be abridged, if the testimony were admitted, since the technician who made the test would be the one to testify against the defendant and would be available for cross-examination. *Sewar*, 468 F.2d at 238.

In *Marchese v. State of California*, 545 F.2d 645 (9th Cir. 1976), the defendant's parole officer testified from notes made from the defendant's case file. The prosecution had seen the whole file. The defendant was given access to the notes but not to the file. The court held that the admission of the parole officer's testimony under these circumstances was not constitutional error. *Id.* at 648.

In *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972), the court upheld a conviction which depended, in part, on the testimony of an expert witness as to the value of certain property. The expert had appraised the property on the basis of certain corporate reports which were not made available to the defendant. The defendant challenged the conviction on the ground that the denial of his access to the underlying reports impeded his ability to confront and cross-examine the expert. The court held that the defendant had had an adequate opportunity to cross-examine the expert and that

his rights of confrontation and cross-examination had not been abridged. *Id.* at 1290. The court reasoned that the appraisal was the conclusion of the expert and that the process behind his conclusion and his knowledge of the accuracy of the reports upon which he relied were adequately challengeable in cross-examination. *Id.*

The primary factor in this Court's decision to admit Mr. Mintken's testimony despite the absence of the master list is the unique relationship of the list, Mr. Mintken's conclusions regarding potential validity, and the value of the bonds. The issue in the case is the value of the bonds - not their value in some abstract sense, but the value they have in a normal commercial context. It is the Court's perception that that value is determined by Mr. Mintken's conclusions as to underlying validity, not be investigation of the master list or other background records. Mr. Mintken is the only person who responds to inquiries concerning the validity of the bonds. His assessment is the only public pronouncement on their validatability. In response to an inquiry concerning a particular bond, Mr. Mintken responds that the bond must be presented for redemption before its potential validity is reported. Upon presentation of a bond, Mr. Mintken determines the bond's potential validity, processing a validatable bond for payment or returning an appropriately invalid bond to the bearer. It is Mr. Mintken who, by reporting his conclusion, informs the public of a particular Rhine-Westphalia bond's potential validity and, therefore, its potential value.

This perception leads the Court to conclude that the relevant inquiry concerning a bond's validity ends with a thorough investigation of Mr. Mintken's conclusion and the processes behind it, which may be accomplished by his

cross-examination without production of the master list. In this case, as in *Williams*, 447 F.2d 1285, the witness who testified to his conclusions was vigorously cross-examined about the background and process behind his conclusions, as well as about the reliability and accuracy of the master list and other records. His testimony regarding background was relevant to the weight and credibility assigned by the jury to his testimony regarding his conclusions, but it did not undermine the admissibility of that testimony. Although the conclusions in *Williams* may have been more independent products of the expert than are Mr. Mintken's conclusions, the Court finds *Williams* aptly analogous and persuasive.

In every case, challenges to conclusions drawn by witnesses on material issues must end at some point. The question is how far into the background of those conclusions the inquiry must be permitted to go. In this case, the value of the bonds depends on their validity, which depends on Mr. Mintken's conclusions, which rely on the master list, which rely on the post-war bank records, which rely on the pre-war bank records and the history of the War, which rely on the records of the bond issue - and so on, *ad infinitum*. The Court concludes that, under the circumstances of this case, the relevant inquiry here need not go beyond Mr. Mintken's testimony on direct and cross-examination in order to make his conclusions admissible. If the jurors feel that his testimony is impeached by his failure to produce the list or for any other reason, they are free to ignore that testimony.

One additional factor concerns the Court. Testimony in this case suggests that there has been considerable use of Rhine-Westphalia bonds, and other similarly situated

bonds, in the United States and Canada. In an effort to control the illegal use of the bonds, several prosecutions have been initiated. Since the government cannot by any means produce the records, testimony such as Mr. Mintken's may be the only available evidence on the value of the bonds. Without such evidence, people using such bonds illegally - that is, materially overvaluing the bonds and using them for collateral on loans - cannot be successfully prosecuted. Such a result would assure virtual immunity from prosecution to anyone attempting to use the bonds in the United States in this way. The prospect of the result has not influenced the Court's analysis, but it has caused the Court to make that analysis - to take a hard look at the issues involved and to temper the ordinary tendency to resolve borderline evidentiary questions in favor of the defendant.

REMAINING ISSUES

The defendant raises several other less complex issues in support of his motions. He maintains that he was denied access to the notes and documents from which Mr. Mintken testified.

> "It is well settled that if a witness uses any paper or memoranda while he is on the stand to refresh his memory in giving his testimony, the opposing side, upon proper demand, has the right to see and examine that paper or memoranda and to use it in cross-examining the witness."

Marcus v. United States, 422 F.2d 752, 754 (5th Cir. 1970). In this case, the defendant was afforded complete access to the papers sought. Some of Mr. Mintken's notes were coded. He explained all the coded notations and stated in effect that the whole code had been thereby explained in court.

A printed document used by Mr. Mintken and made available to the defendant did not, as the defendant alleged, state on its cover that it contained errors. It stated that mistakes might appear in the document. Mr. Mintken explained that this is a common disclaimer used on printed documents in Germany.

The document was printed in the German language. The defendant now complains that he was not provided an English translation of the document. At trial, the defendant did not request an English translation, nor did he utilize the services of the court-appointed interpreter. Instead, he relied on two interpreters of his own choosing to assist him and his attorneys in examining the document. The court-appointed interpreter was available, and the defendant may not now complain of his own choice to rely on other resources.

The defendant also objects that the London Debt Agreement of 1953, referred to by Mr. Mintken as part of the history behind the bonds, was not proved in evidence. In fact, the document appears as Court's Exhibit 1. The copy is printed in the German language, but the above analysis removes the question of its viability for purposes of this case. Furthermore, the United States was a party to the 1953 Agreement, which was ratified by the Senate and proclaimed as law by President Eisenhower. 4 U.S. Treaties and Other International Agreements 443 (printed in English). The Court may take judicial notice of such United States agreements and proclamations. *See* 10 Moore's Federal Practice § 201.02[1], at II-22 (2d ed. 1976).

For the forgoing reasons, it is Ordered that the defendant's Motions for Arrest of Judgment, for New Trial,

and for Judgment of Acquittal be, and they are hereby, denied.

Dated this 4th day of January, 1980.

/s/: Garnett Thomas Eisele
United States District Judge

APPENDIX E

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

APPENDIX F.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.